LEWATA CONSTRUCTION SDN. BHD.

v.

SHAMALI SDN. BHD & ORS.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL SUIT NO. 23-13-1987]
21 MAY 1992

CIVIL PROCEDURE: *Application by defendants to set aside or vary two orders for irregularity - Whether order made in the absence of defendants and their Counsel regular - Whether an order relating to quantification of the sums due to the plaintiff irregular on account of the fact that it did not correspond with the plaintiff's application for final judgment set out in the summons-in-chambers - Further arguments in open Court - Letter by defendants to Court asking for further arguments in open Court - No reply by Court - Whether defendants could still pursue this course?*

The plaintiff claimed sums due under a building contract. The plaintiff's application for summary judgment was dismissed by the Senior Assistant Registrar (SAR). At the hearing of the appeal in chambers, the defendants and their Counsel failed to turn up in Court. The learned Judge upon considering the arguments of the Counsel for the plaintiff made an interim order for the payment of all sums due from the defendants to the plaintiff subject to quantification of the amount by the SAR. The defendants applied for leave to set aside the interim order and the order relating to quantification. The grounds were that (i) the interim order was irregular, having been made without the opportunity given to the defence to contest the plaintiff's claim and (ii) the order relating to quantification did not correspond with the plaintiff's application for final judgment as set out in the summons-in-chambers.

The defendants had also, subsequent to the hearing, written to the Court requesting for further arguments in open Court. There had been no response from the Court on this.

Held:

[1] Although the appeal was heard in the absence of the defendants and their Counsel it was a judgment given on the merits of the case after Counsel for the plaintiff had argued the matter before Lim Beng Choon J and after the affidavits had been perused by the Judge.

[2] As the judgment was regular and not a judgment in default of appearance, the Court has no jurisdiction to set aside or vary the regular judgment of the Judge.

[3] The order of the Senior Asst. Registrar quantifying the judgment debt due appears to be wrong. Nevertheless, the remedy for redressing that wrong was through an appeal under O. 56 of the RHC 1980 to a Judge in chambers and that has not been done.

[Defendant's application dismissed with costs.]

Case referred to:
Hession v. Jones [1914] 1 KB 421 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 56 r. 2

Other source referred to:
Supreme Court Practice, (1985 Edn.), para. 59/1/22

For the plaintiff/respondent - Mayandi; M/s. Mayandi & Panjaram
For the defendants/applicants - Zakaria; M/s. Zakaria Ahmad Johari & Associates

JUDGMENT

KC Vohrah J:

The application before me was to set aside or vary two orders. The first order was made by Lim Beng Choon J on an application for summary judgment. He made an interim order for payment of all sums due from the defendants to the plaintiff subject to the quantification by the Senior Assistant Registrar (SAR) of the amount. The second order was made by the SAR after she had quantified the amount payable, I dismissed the application with costs.

The 1st defendant, a company, engaged the plaintiff, also a company, to construct houses in a housing scheme. The 1st defendant failed to make progress payments on its contracts with the plaintiff. The plaintiff then stopped work in the scheme and instituted legal proceedings against the 1st defendant in the High Court, Alor Setar, and judgment was obtained against the 1st defendant. Subsequently the plaintiff agreed with all the defendants to carry on the works after: 1) the 1st defendant had assigned all moneys due to it from purchasers of the houses in the scheme to the plaintiff: 2) the other defendants had "jointly and severally guaranteed ... all payments due to the plaintiff from the 1st defendant": and 3) the 1st defendant had agreed to pay interest at the rate of 15.75% per annum on all overdue amounts.

The plaintiff claimed that after deducting all nett amounts due from the purchasers of houses in the said housing scheme the defendants were still indebted to the plaintiff in the sum of RM3,102,192.10 and interest thereon.

An application for summary judgment by the plaintiff in an O. 14 application was dismissed by the SAR On 7 December 1988 Lim Beng Choon J heard the appeal from the decision of the SAR.

When the Judge heard the appeal neither the defendants nor their Counsel turned up for the hearing. The Judge heard the arguments of Mr. Mayandi for the appellant/plaintiff and he set aside the decision of the SAR. He made an interim order for payment of all sums due from the defendants to the plaintiff subject to the quantification of the amount by the SAR.

On 10 December 1988 the High Court received a letter from the 1st defendant dated 9 December 1988 stating that the 1st and all other defendants were requesting for the matter to be adjourned into open Court for further argument. It has to be noted that at that time the application was not made by their solicitors on record although their solicitors on record had not discharged themselves. There does not appear to be any reply by the Court to this letter either to the defendants or to their solicitors.

Pursuant to the order of the Judge to quantify the amount due to the plaintiff, on 28 February 1990, The SAR held an enquiry and accordingly quantified the amount due on the judgment as RM5,248,086.45 at the rate of 15.75% per annum until satisfaction.

On 25 April 1990 a new firm of solicitors filed an application (which was amended subsequently) on behalf of the defendants for leave to be granted to file the application and *inter alia*, for the orders made by the Judge and the SAR to be set aside or varied.

The defendants' contention is that the order of Lim Beng Choon J should be set aside as they were not presented with the opportunity to submit their argument as to the validity and substance of the plaintiff's claim. It was also contended that the order extracted in respect

of his decision does not correspond with the plaintiff's application for final judgment in terms of the summons-in-chambers and is, therefore, also irregular.

In regard to the order of the SAR made pursuant to the order of Lim Beng Choon J it was argued that it is irregular in that the sum of RM5,248,086.45 at the rate of 15.75% per annum till date of realisation was not what was requested for in the summons-in-chambers for final judgment. The prayer therein was for the plaintiff to be at liberty to enter final judgment against the defendants for the sum of RM3,102,192.10 together with interest therein at the rate of 15.75% per annum until the date of judgment and interest on the judgment sum at the rate of 8% per annum from the date of judgment until satisfaction. The defendants also pointed out that the order of the SAR showed that the amount due was calculated up to the date she made the order and not on the date that Lim Beng Choon J gave judgment.

I dismissed the application of the defendants for the following reasons.

Before I go further I think it is necessary to deal with the application for argument in open Court (obviously made under O. 56 r. 2). My view is that it is still open for the defendants to pursue the matter whether Lim Beng Choon J would wish to hear arguments in open Court as there is nothing on record to show the Judge was aware of the application.

As to the argument that the judgment was obtained in the absence of the defendants and their Counsel it has to be pointed out that it was a regular judgment. As is stated in *The Supreme Court Practice* (1985 Edn.) against para. 59/1/22 under the heading "**Rehearing where one party did not appear**":

> Where a party did not appear, and the proceedings were struck out and not heard, the same Court has a discretion to re-instate and hear them (... *Hession v. Jones* [1914] 2 KB 421, p. 427; *Rackham v. Tabrum* [1923] 39 TLR 380); and application should not be made by way of appeal to the Court of Appeal ... *But if, in the absence of the party, the proceedings were heard and determined by the Court on the merits, then except in the case of a verdict or judgment obtained at the trial (to which O. 35 r. 2, relates) the Court has no jurisdiction to rehear them, and the only remedy is by way of appeal* (*Hession v. Jones,* above; *Rackham v. Tabrum,* above.) (Emphasis mine)

In *Hession v. Jones* the head note reads:

> The plaintiff brought an action in the County Court and recovered judgment. The defendant appealed. By some inadvertance the plaintiff, respondent to the appeal, was not represented at the hearing of the appeal.
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> The Divisional Court in the absence of the plaintiff heard the appeal, reversed the judgment of the County Court, and ordered judgment to be entered for the defendant. The plaintiff, on hearing of the result of the appeal, after the order of the Divisional Court had been passed and entered, applied to the Court to reinstate and rehear the appeal:
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> Held, that the Court had no jurisdiction to grant the application.
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> *In re St. Nazaire Co.* [1879] 12 Ch. D 88 followed.

Although the appeal was heard in the absence of the defendants and their Counsel it was a judgment given on the merits of the case after Counsel for the plaintiff had argued the matter before Lim Beng Choon J and after the affidavits had been perused by the Judge (see the order of the Court dated 7 December 1988). It was not a judgment in default of appearance. It was a regular judgment. And I have no jurisdiction to set aside or vary the regular judgment of the Judge.

Finally, I come to the order made by SAR. Although the order of the SAR quantifying the judgment debt due appears to be wrong, the remedy for redressing that wrong is through an appeal under O. 56 of the Rules of the High Court to a Judge in chambers and that has not been done.

It was for the foregoing reasons that I dismissed the application of the defendants with costs.

Also found at [1992] 3 CLJ 1719